IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 369 of 1995

For Approval and Signature:

HONOURABLE MS. JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SABAR SHROFF AND FINANCIERS - Appellant(s)
Versus
PATEL PASHABHAI HIRABHAI & 1 - Opponent(s)

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Appearance :
MR PARESH NAYAK for MR KB PUJARA for Appellant(s) : 1,
SHRIKAR H BHATT for Opponent(s) : 1,

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 26/07/2006

ORAL JUDGMENT

This is an Appeal preferred by the complainant under Section 378 Cr.PC against the order of acquittal dated 12th January, 1994 recorded by the learned Judicial Magistrate, First Class, Idar in Criminal Case No.1561/1991.

On 6th December, 1991 the appellant lodged complaint in the Court of Judicial Magistrate, First Class, Idar against the respondent No.1 for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as, **"the Act"**). The appellant is a partnership firm engaged in the business of finance and money lending. The appellant had advanced a loan of Rs.68,000=00 to the respondent No.1 accused. In repayment of the said loan amount, the accused had issued cheque bearing No.024514 dated 24th October, 1991 in the sum of Rs.68,000=00 in favour of the appellant. On presentation of the said cheque to the banker, the same was dishonoured and returned for "insufficient fund". The appellant, therefore, after following due procedure as envisaged by Section 138 of the Act, lodged the aforesaid complaint.

The complaint was contested by the accused. According to the accused, the accused had borrowed a loan in the year 1985 and the said loan amount was repaid by the accused. At the relevant time, the

appellant had obtained certain blank signed cheques from the accused. After the loan account of the accused was closed, the appellant was required to destroy remainder of the blank signed cheques. However, the appellant did not destroy the remainder of the blank signed cheques. Instead, utilised one of them in the year 1991 to make out an offence against the accused.

In support of the complaint, the complainant gave evidence at Exh.7, produced the offending cheque at Exh.10. On application made by the accused the officer of the concerned bank was examined at Exh.64 and relevant documents i.e. the pay-in-slips, cheques, etc. were produced by the bank with list Exh.65 and were received in evidence at Exhibits 66, 67, 68 and 69.

Considering the evidence on record, the learned Magistrate disbelieved the complaint and upheld the defence put-forth by the accused. It has been held that the appellant had utilised the blank cheques signed by the accused lying with the appellant. On

27th April, 1988 the appellant had deposited the sum of Rs.68,000=00 in the account of the accused. On the same day utilising one of the aforesaid blank cheques bearing No.024515 the appellant withdrew the said sum of Rs.68,000=00 in cash from the account of the accused. More than three years thereafter the appellant had utilised one of the said signed cheques, the offending cheque to create evidence against the accused. In view of the aforesaid findings recorded by the learned Magistrate, the learned Magistrate has recorded acquittal of the accused.

Mr.Nayak has assailed the judgment of the learned Magistrate. He has submitted that the learned Magistrate has failed to raise presumption as envisaged by Section 139 of the Act. In support of his submissions, he has relied upon the judgment of the Hon'ble Supreme Court in the matter of **A.V.Murthy v/s. B.S.Nagabasavanna** [AIR 2002 SC 985]. He has read out the impugned judgment and the evidence on record.

It is not true that the learned Magistrate has

failed to raise the presumption as envisaged by Section 139 of the Act. The learned Magistrate has specifically referred to Section 139 of the Act and the presumption required to be raised under the said Section. As the learned Magistrate has not believed that the accused had given the offending cheque, the question of raising presumption under Section 139 of the Act did not arise. In view of the finding of facts recorded hereinabove supported by the evidence on record, I am of the opinion that the learned Magistrate has rightly recorded acquittal of the accused.

For the aforesaid reasons, the Appeal is dismissed.

(Ms. R.M.Doshit, J.)

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